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In The
Supreme Court of the United States

GENERAL MILLS, INC. & OTHERS,

Petitioner,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court For The Commonwealth Of Massachusetts

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

General Mills, Inc. and Others ("Petitioner") respectfully reply to the Massachusetts Commissioner of Revenue's opposition to Petitioner's request for petition for a writ of certiorari ("Petition") to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

The Massachusetts Commissioner of Revenue's ("Commissioner") brief ignores and obfuscates legitimate Constitutional issues and federal principles raised in this case as much by its expression as by its silence. Four such points are briefly addressed below in reply.

Contrary to the Commissioner's assertions, the Supreme Judicial Court for the Commonwealth of Massachusetts (the "Massachusetts Supreme Judicial Court") was confronted with the Constitutional issues raised in the Petition. Additionally, the Commissioner arbitrarily applies the law calculated to increase Massachusetts' assessment by applying federal law under the guise of state law.

Although the Massachusetts Supreme Judicial Court held that the alleged "sale" of intangible assets from Talbots, Inc. to TalHC was a "sham", the Commissioner still wants to tax the transaction. The transaction cannot be a sham in one respect and taxed as a legitimate transaction in another. Equally as concerning is what the Commissioner failed to say in opposition. Specifically, the Commissioner failed to address the Court's declaration, in *Hunt-Wesson, Inc. v. Franchise Tax Board of California*, 528 U.S. 458, 464 (2000), that a State cannot tax indirectly that which it cannot tax directly. The Commissioner also failed to address Massachusetts' taxation of the phantom

$100 million that General Mills never received. These points are all discussed in the Petition but not addressed in opposition.

I. THE COURT HAS JURISDICTION TO HEAR PETITIONER'S ARGUMENTS BECAUSE PETITIONER'S ARGUMENTS WERE RAISED BELOW

Petitioner raised below both the Due Process Clause and the Commerce Clause arguments and the "step-transaction" arguments. On page 7 of his opposition brief, the Commissioner asserts: "the Supreme Judicial Court was not confronted with and did not address either of the two issues Petitioner[ ] now seek[s] to present to this Court."

The Due Process and Commerce Clause arguments discussed in the Petition are precisely the same issues the Petitioner has been continuously asserting from the outset. That is, as a matter of the Constitutional protections afforded by the Due Process Clause and the Commerce Clause, a State may not apportion income unrelated to it, *i.e.*, it cannot apportion income from "non-unitary" businesses. *See Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992); *F.W. Woolworth Co. v. Taxation & Revenue Dep't of N.M.*, 458 U.S. 354 (1982); *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982); *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U.S. 425 (1980).

The foregoing cases were discussed by the Appellate Tax Board ("Board") (App. 57a-64a), and the Massachusetts Supreme Judicial Court (App. 10a-18a), but the Board and the court failed to apply the unitary business principles to Talbots. Rather they both disregarded those

Constitutional protections in favor of imposing a *federal* fiction which both tribunals determined was controlling. (App. 18a-24a, 64a-67a.) These "unitary" cases and arguments discussed by the Board and the Massachusetts Supreme Judicial Court have been the kernel of Petitioner's arguments from the moment of trial to this very day. It is inconceivable how the Commissioner could argue that these Constitutional issues have not been previously raised given (1) the amount of time and effort spent by Petitioner in arguing these points before both the Board and the Massachusetts Supreme Judicial Court and (2) the creativity used by the Commissioner to attempt to thwart the Constitution's Due Process and Commerce Clause protections.

Further, the Commissioner presently alleges to this Court the argument he previously posed to the Massachusetts Supreme Judicial Court: namely, that the "step-transaction" argument had not been previously raised. But the Massachusetts Supreme Judicial Court expressly disagreed (App. 27a, n.12) and found that it had been raised at trial before the Board. (App. 24a-27a.) Additionally, the Massachusetts Supreme Judicial Court discussed the issue. Clearly, Petitioner's argument regarding misapplication of the step-transaction doctrine has been previously raised.

II. THE COMMISSIONER MAY NOT ARBITRARILY APPLY FEDERAL LAW UNDER THE GUISE OF STATE LAW

In page 10 of his opposition brief, the Commissioner argues that the Massachusetts version of the "step-transaction" should be respected.

The step-transaction doctrine is *not* a state law principle. Conversely, the "step-transaction" doctrine has its roots in federal tax law. In two landmark decisions by this Court in *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945), and *Minnesota Tea Co. v. Helvering*, 302 U.S. 609 (1938), the form of the transaction was disregarded and the tax was applied on the basis of the underlying economic substance. Specifically, this was accomplished by ignoring *all* of the intermediate steps or ancillary transactions. Both federal and state courts have routinely applied this step-transaction doctrine in tax cases.

In the case at hand, however, Massachusetts arbitrarily upholds and disregards the form of the same segment of the same transaction in an attempt to increase the tax liability beyond what is dictated by the economic substance of the transaction. The Commissioner claims that he is entitled to inconsistently and selectively apply the "step-transaction" doctrine as a matter of state law, yet he cites no authority for this proposition whatsoever.

III. ONCE A TRANSACTION IS PROPERLY DEEMED A "SHAM" THE STATE MAY NOT TAX THAT SHAM TRANSACTION

The Commissioner argued, and the Massachusetts Supreme Judicial Court agreed, that the so-called "Day 1" transaction (the transfer of intangible assets by Talbots, Inc. to TalHC and TalHC's sale of those assets to the buyer) was a "sham." Petitioner does not disagree. However, on page eleven of his opposition brief, the Commissioner argues that the very transaction that Massachusetts makes out to be a sham should itself be respected and taxed separately. As a sham, however, the transaction should be disregarded in its entirety.

The result of disregarding the "Day 1" transaction in its entirety is that Talbots, Inc. never transferred the intangible assets and those assets moved (under ownership rights) to the buyer as part of the stock sale. The Court has already held that such a stock sale of a non-unitary business is not apportionable. *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992). Massachusetts cannot label a transaction a sham and then tax it. As the California Supreme Court so aptly observed: "'Men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." *Title Ins. Co. of Minn. v. State Bd. of Equalization*, 4 Cal. 4th 715, 730, 842 P.2d 121, 130 (1992) (citations omitted).

IV. THE COMMISSIONER FAILS TO ADDRESS DISPOSITIVE ISSUES

The Commissioner failed to oppose dispositive arguments and facts in his opposition brief. This failure shows that he cannot support his unconstitutional position.

Specifically, the Commissioner failed to address the Court's prior ruling that a state is prohibited from taxing indirectly that which it is constitutionally prohibited from taxing directly. *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458, 464 (2000). That means that Massachusetts cannot do an "end run" around *Allied-Signal* by attempting to use a *federal* fiction to breach the protections against "non-unitary" apportionment by a State, established in *Allied-Signal*.

The Commissioner's brief also fails to address the "phantom" $100 million that it taxed even though General

Mills never received it. The Commissioner does not give any authority for Massachusetts taxing the phantom $100 million for a transaction that it regards as a "sham" that should be disregarded. The Commissioner's silence is deafening.

The Commissioner's silence on these important facts and arguments further demonstrates Massachusetts' failure to "turn square corners."

CONCLUSION

For the foregoing reasons and the reasons raised in the Petition for a Writ of Certiorari, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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